In the

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1936

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FRANCIS E. RINEHART,

Appellant,

-v.-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

APPELLEE'S BRIEF AND MOTION TO DISMISS APPEAL

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PRELIMINARY STATEMENT

Appellee moves to dismiss the appeal of appellant from a final order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered the 7th day of December, 1978, striking his name from the roll of attorneys in the State of New York, based upon his federal felony conviction for violating 26 U.S.C. §7206(1).

STATEMENT OF THE CASE

Appellant was admitted to the practice of law in the State of New York on June 24, 1953, at a term of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

On May 9, 1977, appellant was convicted, in the United States District Court for the District of Massachusetts of making and subscribing to a joint federal income tax return which was verified by a written declaration that it was made under the penalties of perjury, which said joint income tax return he did not believe to be correct as to every material matter, in violation of Title 26, United States Code, Section 7206(1). The appellant was sentenced to a term of imprisonment of one year, the execution of which sentence was suspended. Appellant was placed on probation for a period of one year, and was ordered to pay a fine of five thousand dollars ($5,000.00).

On December 7, 1978, by order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, appellant's name was struck from the roll of attorneys in the State of New York, pursuant to New York Judiciary Law §90, subd. 4, as it then existed,[1] Matter of Rinehart, 65 A.D.2d 63 (1st Dept. 1978). The New York Court of Appeals, the State's highest appellate court, denied appellant leave to appeal from the order striking his name from the roll of attorneys, and dismissed appeals taken by him on March 29, 1979. Matter of Rinehart, 46 N.Y.2d 1036(1979).

[1]Since the time of the order striking appellant's name from the roll of attorneys, New York Judiciary Law §90 has been amended, and may provide a basis for appellant to seek further remedies within the State.

POINT ONE

APPELLANT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The appeal brought by appellant is similar to applications for review by this Court made by other persons who were stricken from the roll of attorneys in New York under the same authority as in appellant's case. Thies v. Joint Bar Association Grievance Committee, 61 A.D.2d 1037 (2d Dept. 1978), aff'd 45 N.Y.2d 865(1978), amended remittitur 45 NY2d 924 (1978), appeal dismissed ____ U.S. ____, 99 S. Ct. 2154 (1979); Brasco v. Joint Bar Association Grievance Committee, 62 A.D.2d 1006 (2d Dept. 1978), leave to appeal denied 45 N.Y.2d 711 (1978), cert. denied ____ U.S. ____, 99 S.Ct. 1993 (1979) Podell v. Joint Bar Association Grievance Committee, 61 A.D.2d 1019 (2d Dept. 1978), leave to appeal denied 45 NY2d 711(1978), cert. denied ___ U.S. ____, 99 S.Ct. 1992 (1979); Fayer v. Joint Bar Association Grievance Committee, 63 AD2d 709 (2d Dept. 1978), leave to appeal denied 45 N.Y.2d 708(1978), cert. denied

____U.S.____, 99 S.Ct. 847(1979); Rosenberg v. Joint Bar Association Grievance Committee, 62 A.D.2d, 1065(2d Dept. 1978), leave to appeal denied 44 N.Y.2d 648, cert. denied ____U.S.____, 99 S.Ct. 327(1978); Davis v. Joint Bar Association Grievance Committee, 60 A.D.2d 613(2d Dept. 1977), leave to appeal denied 44 N.Y.2d 641 (1978), cert. denied ___ U.S.____ 99 S.Ct. 217 (1978); Peltz v. Joint Bar Association Grievance Committee, 60 A.D.2d 587(2d Dept. 1977), leave to appeal denied 43 N.Y.2d 646, appeal dismissed 43 N.Y.2d 844(1978), cert. denied 436 U.S. 926 (1978).

In each of these cases this Court denied the disbarred attorney review of his State disbarment proceedings. In Davis and Rosenberg the attorneys were convicted of felony income tax evasion under 26 U.S.C.§7201 as opposed to appellant's conviction for false and fraudulent filing of income tax returns in violation of 26 U.S.C. §7206(1). If anything, appellant's

conviction evidences conduct involving more serious professional misconduct inasmuch as the statute of which he was convicted of violating has been held to be a perjury statute. United States v. Levy, 533 F.2d 969(5th Cir. 1976); United States v. Romanow, 509 F.2d 26(1st Cir. 1975).

Appellant raises no issues to distinguish his case from those aforementioned cases in which this Court recently denied appellate review.

Appellant, in his own brief, concedes that there is no substantial federal question, when he states that "each state itself must be the arbiter of what shall be the consequences of a person's conduct upon his right to practice law in that state." (Appellant's Brief, p. 36.)

This Court has long recognized that an attorney convicted of a felony "will be struck off the roll as of course, whatever the felony

may be, because he is rendered infamous." Ex parte Wall, 107 U.S.265, 273(1882).

Except in narrowly limited circumstances, this Court will not sit in judgment on State disbarments. Theard v. United States, 354 U.S. 278 (1957). See also Selling v. Radford, 243 U.S. 46(1917). It is submitted that appellant has not set forth such circumstances.

New York has determined that attorneys, as officers of the Courts, "must observe the canons of ethics and moral proprieties at the very least to the extent that they do not stand convicted of a federal felony." Matter of Schiffman, 62 A.D.2d 438(1st Dept. 1978). It has been held that the application of New York disciplinary procedures, as in the instant case, in effecting such a State public policy, does not violate the Constitution of the United States. Thies v. Joint Bar Association Grievance Committee, 45 N.Y.2d 865, amended remittitur 45 N.Y.2d 924(1978), appeal dismissed

___U.S.___, 99 S.Ct. 2154(1979).

"Membership in the bar is a privilege burdened with conditions", Matter of Rouss, 221 N.Y. 81, 84(1917). One of those conditions is that an attorney not only obey the law, which is the mandate of every citizen, but that he uphold the laws. In having committed the felony for which he was convicted, appellant violated even the lesser standard imposed upon the ordinary citizen. Having violated his oath as an attorney to such a degree as to have been convicted of a federal felony, appellant was disbarred by the State in the proper exercise of a State function.

Accordingly, appellant having failed to present a substantial federal question, the appeal should be dismissed.

POINT TWO

APPELLANT WAS NOT DEPRIVED OF ANY CONSTITUTIONALLY PROTECTED RIGHT BY THE APPLICATION OF THE NEW YORK AUTOMATIC DISBARMENT STATUTE.

New York's automatic disbarment statute has been in existence for almost a century. [See New York Laws of 1890, ch. 528. See also Matter of E, 65 How. Pr. 171(1879); Matter of Niles, 48 How. Pr. 246, 251(1875) Robinson, J. concurring].

It evidences a New York public policy which declares that those attorneys who so seriously violate their oaths as to be convicted as felons are unfit to practice law in the State. The philosophical basis underlying that public policy was stated most succinctly by Judge Matthew Jasen of the New York Court of Appeals as follows:

> "To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice' but instead would invite scorn and disrespect for our rule of law."

Matter of Mitchell, 40 N.Y.2d 153, 156(1976).

Due process does not require that a hearing be held in the disciplinary forum in every case before discipline may be imposed. Where an attorney commits a felony "a court has power to exercise summary jurisdiction." Ex parte Wall, supra.

Appellant claims that his plea of guilty in the Federal court was predicated upon his belief that he would not be subject to New York Judiciary Law, §90, subd. 4, providing for automatic disbarment.

What Appellant argues here is that had he anticipated the decision of the Court of Appeals in Matter of Chu, 42 N.Y.2d 490 (1977), he would not have entered his plea of guilty. Appellant assumes too much in this argument of harm. He assumes that he would not have been disbarred absent Chu. Yet disbarment was always a discretionary disciplinary option open to the Court under New York Judiciary Law, §90, subd. 2. Matter of Levy, 37 N.Y.2d 279 (1975).

The fact that Appellant pleaded guilty, as opposed to going to trial, does not render his conviction ineffectual for purposes of the automatic operation of Judiciary Law §90, subd. 4. Matter of Whitestone, 38 A.D.2d 92(1st Dept. 1972); In re Hendrickson, 267 App. Div. 772(2d Dept. 1943); In re Gunner, 180 App. Div. 923(1st Dept. 1917). Appellant had an absolute right to a trial by Jury. U.S. Const. Amend. VI.

Appellant, by claiming "detrimental reliance" upon his belief as to the probable consequences of his conviction at the time of the entry of his plea, attempts to vitiate his felony conviction by collaterally attacking it in the disciplinary forum. This he may not do. Matter of Levy, supra.

Appellant's claim that his plea may have been made involuntarily by his reliance on his belief that he would not be automatically disbarred, in addition to being an improper attack upon his conviction, is not supported by the law. As this Court has said: "A voluntary plea of guilty intelligently made in the light of the then

applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Brady v. United States, 397 U.S. 742, 757 (1970)

In another opinion, this Court noted:

> Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing or intelligent act. [McMann v. Richardson, 397 U.S. 759, 774 (1970)].

There is no doubt here that the plea was intelligent and knowing. In any event, such a collateral attack on the felony conviction is impermissible in the disciplinary forum and may be heard only in the criminal forum.

Appellant's automatic felony disbarment does not deprive him of due process of law. It is predicated upon his Federal conviction, at which time he had a full and complete opportunity to have the government prove its case against him "beyond a reasonable doubt far more stringent

than the standard of 'fair preponderance' applicable at a disciplinary hearing," Matter of Kahn, 38 A.D.2d 115(1st Dept. 1972), aff'd. 31 N.Y.2d 752. "Respondent's constitutional guarantee of due process was safeguarded by his [right to a] jury trial and appellate review," Matter of Abrams, 38 A.D.2d 334, 336 (1st Dept. 1972). That he failed to avail himself of these rights by a conscious, deliberate choice on his part does not result in a denial of due process.

Having pleaded guilty, Appellant voluntarily, knowingly, and intelligently chose not to risk his chances at trial and to litigate the question of his guilt, but exacted a plea bargain. He should not be permitted to assert that he was prejudiced by a deprivation of constitutional rights which he waived by his guilty plea. People ex rel Woodruff v. Mancusi, 41 A.D.2d 12(4th Dept. 1972).

CONCLUSION

The appeal should be dismissed.

Dated: New York, New York
July 30, 1979

Respectfully submitted,

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